KWONG YIK BANK BHD.

v.

TRANSBUILDER SDN. BHD. & ORS.

HIGH COURT MALAYA, KUALA LUMPUR
MAHADEV SHANKAR J
[CIVIL SUIT NO. C717 OF 1983]
25 FEBRUARY 1988

CIVIL PROCEDURE: *Appeal against Senior Assistant Registrar's decision - Carbon copies of letter sent to the guarantor - Whether formal letter of demand was served on guarantors - Whether action premature - Whether prior demand is a condition precedent to the creation of liability in a guarantor - Language of the guarantee and the nature of the liability it creates.*

The plaintiffs granted an overdraft facility in favour of the first defendant company. The said facility was secured by a joint and several guarantee of the other defendants who were all directors of the first defendant in their personal capacity. The first defendant defaulted in its obligations. On 18 December 1982 the plaintiffs (within seven days) sent a demand letter to the first defendant. The plaintiff also gave notice that if this demand was not complied with, they would be instructing their solicitors to proceed with legal action "against you and your directors for the recovery of the entire facility". Carbon copies of this letter was sent to each of the other defendants. All defendants ignored this notice. The plaintiff thereon filed this action. Judgment in default of appearance was entered against the first, second, third, fourth and fifth defendants. The third defendant's only ground on which he denied liability to pay the sum claimed was that no demand had been made from him for payment of the same.

Held:

[1] The liability of a guarantor depends on the language of the instrument and the nature of the liability it creates.

[2] The obligation of the third defendant was not a collateral promise to pay on demand if the primary debtor did not pay. The clause in question imposed primary and parallel obligation on the first defendant and all the guarantors to pay on demand all monies owing to the bank. Clause 14 made each of the guarantors a principal debtor.

[3] In these circumstances no antecedent demand was required to create a cause of action and the mere filing of the writ and the service thereof was a sufficient demand obliging the defendants to pay.

[4] In any event the letter dated 18 December 1982 was a demand on the third defendant as well as for all other directors of the company and the company itself.

[Judgment against third defendant with cost and interest.]

Cases referred to:

United Prime Corporation Berhad v. Q. Built Construction (M) Sdn. Bhd. & 3 Ors. [1987] CLJ (Rep) 1048

Dow Banking Corporation v. Mahnak Spinning and Weaving Corporation and Bank Mellat [1983] 2 Lloyd's LR 561

Royal Bank of Canada v. Oram & Ors. [1978] 1 WWR 564

Royal Bank of Canada v. Ruben [1978] 48 APR 707
Re J. Brown's Estate Brown v. Brown [1893] 2 Ch 300
Bradford Old Bank Limited v. Sutcliffe [1918] 2 KB 833
Esso Petroleum v. Alstonbridge Properties [1975] 1 WLR 1474

JUDGMENT

Mahadev Shankar J:

This is an appeal by a guarantor. The basic complaint is that no formal letter of demand was served upon him. Therefore it is contended that the plaintiffs had no cause of action against him. This line of defence has become so common in the Commercial Court that one may perhaps be pardoned for calling it the guarantors' charter. In this particular case as in the case of *Public Bank Berhad v. Chan Siok Lie & Ors* (K.L. High Court Civil Suit No. C3599 of 1985) the argument did not find in favour with me. I will now say why.

The plaintiffs are bankers. The first defendant is a company which was in the business of housing construction. The second, third, fourth and fifth defendants were directors of this company. They applied for an overdraft facility in favour of the company in 1982. On 12 January 1982 the bank sent the company a letter approving an overdraft facility to a limit of RM100,000 with interest at 15% per annum with monthly rests. One of the conditions was that the overdraft facility should be secured by a joint and several guarantee of all the directors of the company in their personal capacities.

On 19 February 1982 the second, third, fourth and fifth defendants each signed a formal letter of guarantee. The material clauses in this letter of guarantee reads:

> 1. I/We will pay you on demand
>
> (i) All monies which now are or may during the operation of this agreement be owing to you from the customer or remain unpaid on the general balance of the customer's account with you... including interest at such rate as may be from time to time agreed between the customer and you or allowed by you with monthly rests although the relation of banker and customer may have ceased;
>
> 4. This guarantee shall be a continuing guarantee to you to the extent of Ringgit One Hundred Thousand (RM100,000) for the purpose of securing not merely an equivalent amount (but subject always to the said limit of RM100,000 the whole of the monies or general balance in clause (i) hereof mentioned... with interest on the sum claimable from me/us at the rate of 15 per centum (15%) per annum with monthly rests from the date of my/our receiving demand for payment thereof ...
>
> 10. Any demand ... may be made ... by letters sent by post addressed to me/us or each of us at my/our address specified herein ... and the demand so sent shall be deemed be served on the day following that on which it is posted.
>
> 14. As a separate independent stipulation, I/we agree that any sum or sums of money which may not be recoverable from me/us on the footing of a guarantee whether by reason of any legal limitation disability or incapacity on or of the customer or by any fact or circumstance whether known to you or not shall nevertheless be recoverable from me/us or each of us as sole or principal debtors.

The company defaulted in its obligations. Several reminders were sent and the defaults were not remedied. So on 18 December 1982 by an AR Registered letter the bank gave notice that it required the balance and outstanding interests as at 18 December 1982 which then stood at RM$116,063-37 to be settled within seven days. The bank also gave notice that if this

demand was not complied with they would be instructing their solicitors to proceed with legal action, "against you and your directors for the recovery of the entire facility." Carbon copies of this letter were sent to each of the other defendants. I would pause here to emphasise that this letter was not a mere carbon copy of a demand addressed to the company. It contained a specific notice of the bank's intention to commence proceedings against the other defendants and such notice was expressly directed to each of the other defendants.

All the defendants ignored this notice.

On 29 March 1983 the bank filed this action. It prayed for judgment against each of the defendants for RM100,000 together with interest thereon at 15% per annum up to 28 February 1983 making a total sum of RM120,409.13 with interest thereof at a contractual rate.

It is distressing to see the difficulties which the bank's solicitors had in effecting service on the defendants. However eventually they did obtain judgment in default of appearance against the first defendant company and the second, fourth and fifth defendants. The first defendant was wound up. Only after an order of substituted service was obtained and implemented against the third defendant did he enter an appearance on 12 February 1986. The plaintiff applied for summary judgment. In the affidavit in support of this application the bank manager affirmed the usual affidavit in support setting out the facts and the documents upon which the bank relied.

We are concerned in this judgment only with the third defendant. He did not file any affidavit to show cause why leave to defend should be granted. After entering an appearance and before the application for summary judgment was made the third defendant filed a defence. He did not dispute that he had signed the guarantee. The only ground on which he denied liability to pay the sum claimed was that no demand had been made from him for payment of the same.

It is upon the strength of this material that Senior Assistant Registrar gave unconditional leave to defend.

After the Senior Assistant Registrar had decided the matter and before I heard the bank's appeal the parties filed some further affidavits. No leave was obtained for the consideration of this material. In the proceedings before me I did not feel the need to be influenced in either direction by this new material. In any case they did not take the matter any further. So what I am left with is to deal with the legal submissions which were made on behalf of the third defendant by Mr. Nithin Nadkarni.

His first submission was that there was no cause of action because no proper demand had been made. He contended that the bank's letter of 18 December 1982 aforesaid was not the proper demand and therefore this action was premature.

First he relied on *United Prime Corporation Berhad v. Q Built Construction (M) Sdn. Bhd. & 3 Ors.* [1987] CLJ (Rep) 1048. I am unable to agree with Mr. Nadkarni that this case is authority for the proposition he has advanced. As appears from the judgment that case concerns the liability of the first defendant as a principal debtor under an equipment lease agreement and the liability of the other defendants as guarantors. Article 17(1)(a) of the lease agreement gave the lessor an option to declare a part of the entire amount of the total rent immediately payable by the lessee or alternatively under Article 17(1)(c) to terminate the lease and to demand the full amount of the agreed loss value. The lessor sent a letter to the lessee terminating the agreement and requiring payment within fourteen days of the total rent outstanding. Carbon copies of this letter were sent to the guarantors with an addendum,

"This is a demand upon you". Dr. Zakaria Yatim J pointed out that in the statement of claim the plaintiffs had not pleaded the question of termination of the said lease agreement. Furthermore he pointed out that the amount stated in the letter was inconsistent with what was provided in the said lease agreement under art. 17(1)(c). It is on these grounds that he declined to allow a lessor to sign judgment against the lessee. As for the guarantors he added that the letter did not constitute proper demands against them. He then said, "In order to give the contract of guarantee business efficacy the said letter must state clearly, what the guarantors were required to pay."

From this it should become apparent that this was a case which applied only to its own facts. I would emphasise that the terms of the guarantee in that case did not fall to be considered by the Court and what is more, liability had not been established against the principal debtor on the pleadings.

Next I refer to *Dow Banking Corporation v. Mahnak Spinning and Weaving Corporation and Bank Mellat* [1983] 2 Lloyds Law Reports 561. Mr. Nadkarni relied upon this authority as laying down a general proposition that before a guarantor's liability could be said to arise, a clear and unequivocal demand must be made setting out the exact sum which has to be paid. However a close persual of that decision indicates otherwise. By a loan agreement dated 1 March 1978 Dow Banking Corporation (Dow) agreed to lend Mahnak Shipping & Weaving Corporation (Mahnak) US$5 million. The borrowers' obligation was guaranteed under a separate agreement dated 14 March 1978. The loan was repayable in instalments. On 5 October 1981, there fell due for repayment one instalment of the principal amounting to $1 million together with interest. Mahnak failed to pay. Dow thereupon exercised its right to call in the entire loan. I would pause here to emphasise that this was a situation where Mahnak as principal debtor was entitled to repay the loan over a set period of time in instalments. In the event of default, Dow was entitled upon giving notice, to require accelerated payment not only of the instalment due but also all the other instalments which would thereafter become payable from time to time under the agreement. Section 11.1 of the loan agreement reads, "The principal of and accrued interest on the loan shall become immediately due and payable without need or further legal formality, at the option of and upon the first demand by the bank...". In other words before Mahnak fell under the liability to make accelerated repayment of the entire loan, the condition precedent had to be fulfilled, namely Dow was required to first made a demand. Lloyd J said at p. 565:

> Did Mahnak ever come under an obligation to make accelerated repayment of the entire loan under the loan agreement? This depends on whether the plaintiff ever made a demand for repayment: See s. 11.1. of the loan agreement. The telex upon which the plaintiff relies as being the demand for accelerated repayment is the important telex of 28 November 1979 which I have read verbatim. But that was a telex addressed to the bank, not Mahnak. So far as appears from the telexes, there was never any demand for accelerated repayment by Mahnak. In the absence of such a demand, there was never any obligation on the part of Mahnak to make accelerated repayment; and in the absence of such an obligation there could not be any valid demand on the bank.

In other words the issue as to whether a prior demand is a condition precedent to the creation of liability in a guarantor, must depend on the precise terms of the contract. Indeed the two Canadian cases which Mr. Nadkarni cited brings this out very clearly.

In *Royal Bank of Canada v. Oram & Ors.* [1978] 1 WWR 564 it was held that unless the demand for payment had been made, an action in Court would be premature. But then the words of that guarantee read as follows (See p. 569):

> No suit based on this guarantee shall be instituted until demand of payment has been made...

The same form of words occur in *Royal Bank of Canada v. Ruben* [1978] 48 APR 707 at p. 708.

There are no such words in the letter of guarantee signed by the third defendant. Consequently I hold that this line of argument is devoid of merit.

I made my order herein on 29 April 1987. The third defendant then filed his notice of appeal. Thereafter the Supreme Court decided in *Mok Hin Wah v. U.M.B.C* [1987] CLJ (Rep) 219. On the first of September 1987 the third defendant's solicitor sent in a copy of this decision by way of additional support to Mr. Nadkarni's submission.

In the absence of information on the point I am constrained to assume that in *Mok Hin Wah's* case the guarantee did provide in so many words, that no suit based on the guarantee shall be instituted until demand of payment had first been made; or alternatively that there was no provision in that agreement whereby the guarantors were to be treated as principal debtors, with the result that their liability was only collateral.

It is therefore necessary for me to say something further. In *Re J. Brown's Estate, Brown v. Brown* [1893] 2 Ch. 300 at p. 304 Chitty J said:

> ... Without going through the whole of the cases to which I have referred in the course of the argument, it is plain that a distinction has been taken and maintained in law, the result of which is, that where there is a present debt and a promise to pay on demand, **the demand is not considered to be a condition precedent to the bringing of the action**. But it is otherwise on a promise to pay a collateral sum on request, for then the request ought to be made before action brought. ... It is a question, then, of the construction of the instrument; ...
> (Emphasis added)

In *Mok Hin Wah v. UMBC*, Tun Haji Mohamed Salleh bin Abas the Lord President referred to *Bradford Old Bank Limited v. Sutcliffe* [1918] 2 KB 833. The critical passage in the judgment of Scrutton LJ is at p. 848 which reads as follows:

> Was it here necessary for the plaintiff to prove a demand? Generally a request for the payment of a debt is quite immaterial, unless the parties to the contract have stipulated it should be made: per Parke B. in *Walton v. Mascall*. **Even if the word "demand" is used in the case of a present debt, it is meaningless, and express demand is not necessary**, as in the case of a promissory note payable on demand: *Norton v. Ellan*. But it is otherwise where the debt is not present but to accrue, as in the case of a note payable three months after demand: In *re Rutherford;* or where the debt is not a present debt, but a collateral promise: *Birks v. Trippet*. In *re Brown's Estate*, the promise of a surety to pay on demand if his principal does not appears to me to be a collateral promise within the authorities; and I entertain no doubt that in this guarantee the provisions about demand are a real stipulation, and not mere words.
> (Emphasis added)

It seems to me that what is critical in such cases is the language of the instrument and the nature of the liability which it creates. Thus in *Esso Petroleum v. Alstonbridge Properties* [1975] 1 WLR 1474 Walton J observed in the circumstances of that case:

> I fully accept, of course, that where there is a pre-existing debt which is payable "on demand," **such a demand (other than the service of proceedings) is not a pre-requisite to the bringing of an action to recover that debt:** In *re Brown's Estate, Brown v. Brown*. That case shows of course, that where the character in which payment is required is that of surety, a demand is, in general, necessary; **but I assume for** present purposes (without finding

it necessary so to decide) **that the provisions of clause 5 of the mortgage**, equating the liability of the sureties to that of principal debtor, **is effective to obviate the necessity for a demand merely on this ground**. My difficulty is that the demand in the present case is a demand which of its own intrinsic nature changes the nature of the liability; it turns a liability to pay by instalments into a liability to pay the whole at once. Under these circumstances, in my judgment, even as against a principal debtor, a demand antecedent to the issue of proceedings is a necessary pre-requisite of the whole cause of action. I would put it in this way: that where the pre-existing obligation is to pay the debt by instalments, the demand that it be paid in one lump sum is an act which radically changes the nature of the debtor's obligation, and so is an essential ingredient of any cause of action to recover the lump sum.
...
(Emphasis added)

Whatever else needs to be said on the law, I have already said in *Public Bank Berhad v. Chan Siok Lee & Ors.* (K.L. High Court Civil Suit No. 3599 of 1985 (Unreported).

If I may now focus my attention on the facts, it will be observed from the very first clause of the letter of guarantee that the obligation of the third defendant was not a collateral promise to pay on demand if the primary debtor did not pay. The clause in question the first defendant and all the guarantors to pay on demand all monies owing to the bank. Clause 14 made each of the guarantors a principal debtor. And the terms of the document was such that the debt envisaged on demand was a present debt and not one which was payable by instalments being converted into an accelerated obligation to pay the whole at once.

In these circumstances my view is that no antecedent demand was required to create a cause of action and the mere filing of the writ and the service thereof was a sufficient demand obliging the defendants to pay. In any event I would go further and hold in the circumstances of this case that the letter dated 18 December 1982 was a demand on the third defendant as well as all the other directors of the company and the company itself.

The only other point here I need to deal with is Mr. Nadkarni's submission that the bank was not entitled to judgment for more than RM100,000 under the guarantee. With this interpretation of the guarantee agreement I am unable to agree. The words clearly made the guarantors liable for the repayment not only of the overdraft facility of RM100,000 but also the interest which accrued thereon at the agreed rate.

So I would confirm the judgment I have given herein against the third defendant for the sum claimed in the writ with interest thereon and costs.

Also found at [1989] 1 CLJ 34